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10
11 IN THE UNITED STATES DISTRICT COURT
12 FOR THE NORTHERN DISTRICT OF CALIFORNIA
13 SAN JOSE DIVISION

14 **MANUEL HILL,**

15 Plaintiff,

16 v.

17 **RODERICK HICKMAN, et al.,**

18 Defendants.
19

Case No. C 07-5125 JF

**DEFENDANTS' NOTICE OF
MOTION AND MOTION TO
DISMISS**

20 TO PLAINTIFF MANUEL HILL, PRO SE:

21 PLEASE TAKE NOTICE that Defendants Evans (Defendants) move the Court to dismiss
22 this action under Federal Rule of Civil Procedure 12(b) because Plaintiff Manuel Hill (Plaintiff)
23 failed to exhaust his administrative remedies before filing this action, as required by the Prison
24 Litigation Reform Act (PLRA), 42 U.S.C. § 1997e(a).

25 PLEASE TAKE FURTHER NOTICE that the Court may look beyond the pleadings and
26 decide disputed issues of fact when ruling on Defendants' non-enumerated Rule 12(b) motion.
27 *Wyatt v. Terhune*, 315 F.3d 1108, 1119-20 (9th Cir. 2003). Plaintiff may provide evidence to the
28 Court to dispute that which is presented by Defendants. *Id.* at n.14.

Defs.' Not. of Mot. & Mot. to Dismiss; Mem. of P. & A.

M. Hill v. R. Hickman, et al.
C 07-5125 JF

1 This motion is based on this Notice, the following Memorandum of Points and
 2 Authorities, the declarations and exhibits filed in support of this motion, the proposed order, and
 3 the pleadings and records on file with the Court in this action.

4 MEMORANDUM OF POINTS AND AUTHORITIES

5 ISSUE PRESENTED

6 The PLRA requires inmates to exhaust their available administrative remedies before
 7 filing a federal civil rights action. Should this Court dismiss this action because Plaintiff's
 8 administrative appeals either do not concern the one recognized claim or were not exhausted to
 9 the requisite third level of review?

10 STATEMENT OF THE CASE

11 Plaintiff Manuel Hill, CDCR number E-45048, is a state prisoner incarcerated at Pelican
 12 Bay State Prison (Pelican Bay). Plaintiff filed a complaint under 42 U.S.C. § 1983 that presents
 13 an Eighth Amendment claim against Defendants Hickman and Horel for deliberate indifference
 14 to Plaintiff's serious medical needs. (Order of Service, Docket No. 6, at 2:17-20.) This Court
 15 reviewed the complaint under 28 U.S.C. § 1915A, found that liberally construed Plaintiff has
 16 alleged a cognizable Eighth Amendment claim, and ordered service on Defendants Hickman and
 17 Horel. (*Id.* at 2:23-3:4.)

18 STATEMENT OF FACTS

19 In his Complaint, Plaintiff alleges that when he entered a shower at Pelican Bay he
 20 stepped on a slippery floor and fell, landing on and injuring his back. (Compl. at 3 ¶ 7.) Plaintiff
 21 further alleges that in the three months following his alleged back injury he was not given
 22 adequate medical care for the injury at Pelican Bay. (Compl. at 3 ¶ 8 to 8 ¶ 22.) During that
 23 time, Plaintiff alleges that he experienced severe back pain. (*Id.*)

24 The following two inmate appeals, which Plaintiff attaches as Exhibits A and D to his
 25 complaint, are the only inmate appeals Plaintiff submitted to the Appeals Coordinator at Pelican
 26 Bay that could possibly exhaust the claim in this action:

27 In appeal log number PBSP 05-02880, Plaintiff alleges that the showers in his housing
 28 unit are not safe because there are no slip-prevention measures. (Decl. Wilber at Ex. B; Compl.

1 at Ex. A, 2.) This appeal was denied at the third, or Director's, level of review. (Decl. Wilber at
2 Ex. B; Decl. Grannis at Ex. C; Compl. at Ex. A, 1.)

3 In appeal log number PBSP 05-02833, Plaintiff alleges that he has not received adequate
4 medical care for his back injury. (Decl. Wilber at Ex. C; Compl. at Ex. D, 50.) This appeal was
5 granted at the second level of review, but Plaintiff was advised that the appeal could be
6 submitted to the Director's level of review. (Decl. Wilber at Ex. C; Compl. at Ex. D, 52.)
7 Plaintiff failed to submit the appeal through the Director's level of review. (Decl. Grannis at Ex.
8 C.)

9 SUMMARY OF ARGUMENT

10 This action should be dismissed under Federal Rule of Civil Procedure 12(b) because
11 Plaintiff failed to exhaust his available administrative remedies before filing suit in federal court.
12 Although Plaintiff submitted two inmate appeals that he alleges exhaust his claim, he instead
13 failed to exhaust the claim in this action because his administrative appeals either do not concern
14 the claim recognized by this court or were not exhausted to the requisite third level of review.

15 ARGUMENT

16 **THIS ACTION SHOULD BE DISMISSED BECAUSE PLAINTIFF 17 FAILED TO EXHAUST HIS ADMINISTRATIVE REMEDIES.**

18 **A. The PLRA Requires that Inmates Exhaust Available Administrative 19 Remedies.**

20 The PLRA requires that an inmate exhaust all available administrative remedies before
21 filing a civil rights action in federal court. 42 U.S.C. § 1997e(a); *Porter v. Nussle*, 534 U.S. 516,
22 524 (2002); *McKinney v. Carey*, 311 F.3d 1198, 1199-1201 (9th Cir. 2002). Moreover, the
23 Supreme Court has held that exhaustion of available remedies requires that a prisoner "properly
24 exhaust," which means that "prisoners must complete the administrative review process in
25 accordance with the applicable procedural rules, . . . rules that are defined not by the PLRA, but
26 by the prison grievance process itself." *Jones v. Bock*, 127 S. Ct. 910, 922 (2007) (internal
27 citations and quotation marks omitted) (quoting *Woodford v. Ngo*, 126 S. Ct. 2378, 2384 (2006)).
28 Therefore, "[c]ompliance with prison grievance procedures . . . is all that is required by the
PLRA to 'properly exhaust.'" *Id.*

1 The State of California allows inmates to appeal “any departmental decision, action,
 2 condition, or policy which they can demonstrate as having an adverse effect upon their welfare.”
 3 Cal. Code Regs. tit. 15, § 3084.1. The appeal process in California consists of these levels of
 4 review: (1) informal level; (2) first formal level; (3) second formal level; and (3) third formal
 5 level, also known as the Director’s level review. *Id.* § 3084.5. A decision at the third formal
 6 level, or Director’s level, of review constitutes exhaustion of available administrative remedies.
 7 *Id.* §§ 3084.1(a), 3084.5(e)(2).

8 When an inmate-plaintiff fails to exhaust, a defendant may file a non-enumerated 12(b)
 9 motion to dismiss. *Wyatt*, 315 F.3d at 1119-20 (9th Cir. 2003). In ruling on such a motion a
 10 court may look beyond the pleading to decide disputed issues of fact. *Id.* The proper disposition
 11 for failure to exhaust is dismissal without prejudice. *Id.* at 1120.

12 **B. Appeal Log Number PBSP 05-02880 Does Not Exhaust the Recognized Claim**
 13 **Because it Does Not Address Medical Needs.**

14 The PLRA’s exhaustion requirement exists in part to give the agency “an opportunity to
 15 correct its own mistakes with respect to the programs it administers before it is haled into federal
 16 court,’ and it discourages ‘disregard of [the agency’s] procedures.’” *Woodford*, 126 S. Ct. at
 17 2385 (quoting *McCarthy v. Madigan*, 503 U.S. 140, 145 (1992)).

18 Here, Plaintiff’s appeal log number PBSP 05-02880 does not concern the recognized
 19 claim in this action under the Eighth Amendment for deliberate indifference to serious medical
 20 needs, and therefore Plaintiff did not give CDCR an opportunity to correct the alleged mistakes
 21 through this appeal before Plaintiff haled the defendants into federal court. More specifically,
 22 this Court recognized only one claim in this action, which is an Eighth Amendment claim for
 23 deliberate indifference to serious medical needs. (Docket No. 6 at 2:17-20.) Plaintiff’s
 24 allegations in appeal log number PBSP 05-02880, however, do not concern deliberate
 25 indifference to serious medical needs. Plaintiff instead alleges in this appeal that the showers in
 26 his housing unit are not safe because there are no slip-prevention measures. (Decl. Wilber at Ex.
 27 B; Compl. at Ex. A, 2.)

28 Therefore, in appeal log number PBSP 05-02880 Plaintiff did not give CDCR an

1 opportunity to correct its alleged mistakes s claim before he haled the defendants into federal
2 court, and thus this action should be dismissed.

3
4 **C. Plaintiff Failed to Exhaust Appeal log number PBSP 05-02833 Because He
Did Not Submit it Through the Requisite Third Level of Review.**

5 Under California prison grievance procedures, a decision at the third formal level, or
6 Director's level, of review constitutes exhaustion of available administrative remedies. Cal.
7 Code Regs. tit. 15, §§ 3084.1(a), 3084.5(e)(2); (Decl. Grannis at 2 ¶ 3).

8 Here, Plaintiff failed to exhaust appeal log number PBSP 05-02833 through the requisite
9 third level of review. In appeal log number PBSP 05-02833, Plaintiff alleges that he has not
10 received adequate medical care for his back injury. (Decl. Wilber at Ex. C; Compl. at Ex. D, 50.)
11 This appeal was granted at the second level of review. (Decl. Wilber at Ex. C; Compl. at Ex. D,
12 52.) But the appeal response also put Plaintiff on notice that he had not exhausted this appeal
13 and that there was still a remedy available to him at the third, or Director's, level of review if he
14 was dissatisfied with the second level appeal response. More specifically, the second level
15 appeal response states: "The appellant is advised that *this issue may be submitted for a*
16 *Director's Level of Review* if desired." (*Id.*, emphasis added.) Plaintiff, however, failed to
17 submit this appeal to the third level of review. (Decl. Grannis at Ex. C.)

18 Thus Plaintiff failed to exhaust this appeal, and so this action should be dismissed.

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CONCLUSION

Defendant respectfully requests that the Court dismiss this action under Federal Rule of Civil Procedure 12(b) because Plaintiff failed to exhaust his available administrative appeals for the claim in this action.

Dated: May 16, 2008

Respectfully submitted,

EDMUND G. BROWN JR.
Attorney General of the State of California

DAVID S. CHANEY
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FRANCES T. GRUNDER
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MICHAEL W. JORGENSEN
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DECLARATION OF SERVICE BY U.S. MAIL

Case Name: **M. Hill v. R. Hickman, et al.**

No.: **C 07-5125 JF**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for mailing with the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the United States Postal Service that same day in the ordinary course of business.

On May 16, 2008, I served the attached

DEFENDANTS' NOTICE OF MOTION AND MOTION TO DISMISS

DECLARATION OF C. WILBER IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS w/Exhibits A, B & C

DECLARATION OF N. GRANNIS IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS w/Exhibits A, B & C

[PROPOSED] ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the Office of the Attorney General at 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004, addressed as follows:

Manuel Hill (E-45048)
Pelican Bay State Prison
P.O. Box 7500
Crescent City, CA 95532-7500
In pro per

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 16, 2008, at San Francisco, California.

M. Luna

Declarant


Signature